

REMARKS

1. After entry of this paper, claims 1, 3-5, 10, 12-20, 22, 23, 29-32, 34-47, 49, 50, 52, 53, 67-74, 76, 77, 81-89, 161-166, 172, and 174 are pending.

Reconsideration of this application is respectfully requested.

2. Applicant respectfully submits that the finality of the Office Action dated July 31, 2008, is premature because none of the references cited in the rejections disclose, teach or suggest the “at least one spring element” recited in claims 75-80 and 173, and the Examiner has not addressed this feature in the Office Action. See MPEP 707 and 37 CFR 1.104.

Furthermore, the Examiner refers to “Farrell” in the body of the rejections but does not use Farrell in the statement of the rejection. Consequently, Applicant can not determine whether the Examiner is discussing the Farrell reference or the references cited in the statement of the rejections.

Accordingly, withdrawal of the finality of the Office Action is respectfully requested.

3. Claims 1, 3-5, 10, 12, 17-20, 22, 36-47, 49, 50, 54, 67-74, 81-89, 161-166 and 172-174 stand rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent 3,981,027 to Anderson in view of U.S. Patent 6,321,386 to Monica. Claims 13-16, 23, 28-32, 34, 35, 52-54 and 75-80 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson in view of Monica and further in view of U.S. Patent 6,453,477 to Bainbridge et al. (Bainbridge).

According to MPEP 2142, the Examiner bears the initial burden of factually supporting any prima facie conclusion of obviousness. To establish a prima facie case of obviousness, the Examiner must clearly articulate the reason(s) why the claimed invention would have been

obvious. The Supreme Court in *KSR International Co. v. Teleflex Inc.*, 82 USPQ2d 1385, 1396 (2007) noted that the analysis supporting a rejection under 35 U.S.C. 103 should be made explicit. The Federal Circuit has stated that “rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” In *re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006). See also *KSR*, 82 USPQ2d at 1396 (quoting Federal Circuit statement with approval).

Hence, independent claims 1 and 174 have each been amended to recite “at least one spring element for strengthening an inner shoulder portion of the shell assembly.” This feature was originally recited in each of dependent claims 75 claim 173, which have been canceled by this paper.

Anderson in view of Monica and Anderson in view of Monica and Bainbridge, fail to disclose, teach or suggest a spring element for strengthening the inner shoulder portion of the shell assembly. Moreover, the Examiner has not clearly articulated any reason why this feature would have been obvious. For at least this reason, independent claims 1 and 174, and their respective dependent claims are allowable over Anderson in view of Monica and Anderson in view of Monica and Bainbridge.

Independent claim 10 has been amended to include the subject matter of dependent claim 28, i.e., “at least one substrate of visco-elastic polymer.” Dependent claim 163, which recites “at least one substrate of visco-elastic polymer,” has been rewritten in independent form. Independent claim 34, as submitted previously, recites “at least one substrate of visco-elastic polymer.”

Anderson in view of Monica and Anderson in view of Monica and Bainbridge fail to disclose, teach or suggest an upper torso protector apparatus that employs at least one substrate of visco-elastic polymer. Moreover, the Examiner has not provided any clear rationale to support the bare conclusion that “it would have been obvious to one skilled in the art the device of Anderson when viewed with Monica can be provided with multiple layers of impact absorbing material to absorb greater force of impact as required for a particular application thereof.” For at least these reasons, independent claims 10, 34, and 163 and their respective dependent claims are allowable over Anderson in view of Monica and Anderson in view of Monica and Bainbridge.

Anderson in view of Monica and Anderson in view of Monica and Bainbridge fail to disclose, teach, or suggest the light colored outer fabric layer recited in claims 18, 39, 45 and 174.

Anderson in view of Monica and Anderson in view of Monica and Bainbridge fail to disclose, teach, or suggest the dark colored inner fabric layer recited in claims 20, 41, and 45.

Anderson in view of Monica and Anderson in view of Monica and Bainbridge fail to disclose, teach, or suggest the white colored shell assembly recited in claims 73 and 174.

The Examiner’s conclusion that the color features of claims 18, 20, 39, 41, 45, 73, and 174 are merely decorative or a matter of design choice, is erroneous. The applicant’s claimed color features are for cooling the user’s body, and are not decorative, as asserted by the Examiner. See, for example, paragraphs 0059, 0067, 0073, 0079 of Applicant’s specification. Moreover, the Examiner has not articulated any rationale, as required under the holding of KSR, which supports the conclusion that the claimed color features are a matter of design choice.

In view of the foregoing, withdrawal of these rejections is respectfully urged.

4. The preambles of dependent claims 3-5, 12-23, 29-32, 35-47, 49, 50, 52, 53, 67-74, 76, 77, and 81-89, have been amended to be consistent with the preambles of their respective independent claims. Therefore, claims 1, 3-5, 10, 12-20, 22, 23, 29-32, 34-47, 49, 50, 52, 53, 67-74, 76, 77, 81-89, 161-166, 172, and 174 are in better form for appeal.

5. Favorable reconsideration of this application is respectfully requested as it is believed that all outstanding issues have been addressed herein and, further, that claims 1, 3-5, 10, 12-20, 22, 23, 29-32, 34-47, 49, 50, 52, 53, 67-74, 76, 77, 81-89, 161-166, 172, and 174 are in condition for allowance. Should there be any questions or matters whose resolution may be advanced by a telephone call, the examiner is cordially invited to contact applicants' undersigned attorney at his number listed below.

6. The Commissioner is hereby authorized to charge payment of the fee for the petition for the one (1) month extension of the time, and any additional filing fees required under 37 CFR 1.16 and any patent application processing fees under 37 CFR 1.17, which are associated with this paper, or credit any overpayment to Deposit Account No. 04-1679.

Respectfully submitted,

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